

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

TRANSCRIPT OF RECORD.

Court of Appeals of the District of Columbia.

OCTOBER TERM, 1918.

No. 3178 **507**

NEW ARCADE COMPANY, A CORPORATION UNDER AND
BY VIRTUE OF THE LAWS OF DELAWARE, APPELLANT,

vs.

ERNEST V. OWENS.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

FILED APRIL 25, 1918.

PRINTED JUNE 19, 1918.

Court of Appeals of the District of Columbia.

OCTOBER TERM, 1918.

No. 3178.

NEW ARCADE COMPANY, A CORPORATION UNDER AND
BY VIRTUE OF THE LAWS OF DELAWARE, APPELLANT,

vs.

ERNEST V. OWENS, APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

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Court of Appeals of the District of Columbia.

No. 3178.

NEW ARCADE Co., &c., Appellant,

vs.

ERNEST V. OWENS.

a Supreme Court of the District of Columbia.

At Law. No. 38264.

NEW ARCADE COMPANY, a Corporation under and by Virtue of the
Laws of Delaware, Plaintiff,

vs.

ERNEST V. OWENS, Defendant.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of
Columbia, at the City of Washington, in said District, at the times
hereinafter mentioned, the following papers were filed and proceed-
ings had, in the above-entitled cause, to wit:—

1 *Petition for Writ of Certiorari.*

Filed January 18, 1916.

In the Municipal Court of the District of Columbia.

58771.

No. 38264.

NEW ARCADE COMPANY, a Corporation under and by Virtue of the
Laws of Delaware, Plaintiff,

vs.

ERNEST V. OWENS, Defendant.

The petition of Ernest V. Owens, defendant in the above-entitled
cause, respectfully represents to the court as follows:

1—3178a

1. That the petitioner is a resident of the District of Columbia engaged in the commission merchant business at 935 B Street, Northwest, and files this petition in his own right as hereinafter set forth.

2. That the plaintiff, the New Arcade Company, is a corporation under and by virtue of the laws of the state of Delaware and has filed this suit against petitioner as hereinafter set forth.

3. That your petitioner has been summoned to appear before the Municipal Court of the District of Columbia in case numbered 38264, wherein the New Arcade Company, a corporation, is plaintiff and Ernest V. Owens is defendant, to show cause why judgment should not be given against the defendant in the sum of \$181.50. The date as set out in said subpoena wherein your petitioner was to show cause was January 12, 1916, at 11 o'clock A. M. Your petitioner appeared by his counsel on that day, but no one answered for the plaintiff whereupon the court continued the case for one week from said date.

2 4. Your petitioner avers that this Honorable Court has concurrent jurisdiction in this cause and that petitioner desires to remove said cause from the said Municipal Court of the District of Columbia and have the same tried upon the issue or issues involved therein in this Honorable court in accordance with the statute in such case made and provided.

5. Your petitioner says that he believes that he has a just and meritorious defense to this action, in that he has a claim for damages against the plaintiff, growing out of the same transaction, which is in excess of \$500.00, therefore the said Municipal court would not have jurisdiction to determine this cause.

Wherefore, petitioner prays:

1. That a writ of certiorari may issue from this Honorable court directed to the said Municipal court of the District of Columbia, commanding it to certify to this court the papers and records in this cause as fully and completely as it there appears.

2. That petitioner may have such other and further relief, as, the nature of this case may require and to the court may seem meet and proper.

ERNEST V. OWENS.

EDWIN C. DUTTON,
Attorney for Petitioner.

DISTRICT OF COLUMBIA, ss:

I, Ernest V. Owens, being first duly sworn do depose and say that I am the petitioner herein and defendant in the cause named herein in the Municipal Court, and as such, subscribed my name to the foregoing petition and know the contents thereof; that the matters
3 and things therein stated upon my personal knowledge are true and those stated upon information and belief, I believe to be true. Deponent further says that this application is not made for the purpose of delay, but solely because the petitioner in this cause believes he has a just and meritorious defense to the whole of said claim of plaintiff.

ERNEST V. OWENS.

Subscribed and sworn to before me this 18th day of January,
A. D. 1916.

JOSIE A. GORMAN, [SEAL.]
Notary Public, D. C.

(Endorsed.)

Let the writ issue as herein prayed.

ASHLEY M. GOULD,
Justice.

Return to Writ of Certiorari.

Filed January 24, 1916.

In the Municipal Court of the District of Columbia.

Action for — for \$181.50.

No. 38264.

NEW ARCADE COMPANY, a Corporation, Plaintiff,

vs.

ERNEST V. OWENS, Defendant.

Proceedings.

Date.
1916.

Jan. 5th. Plaintiff's attorney—S. H. Giesy.
" " Affidavit—bill of particulars and bond filed.
" 6th. Summons and copy issued returnable Jan. 12—11 a. m.
" 12th. Summons returned "summoned as within directed."
" 19th. Continued by plaintiff to Jan. 19—11 a. m.
When the annexed writ of certiorari, was received
whereby the proceedings before this Court were
stopped.

4 DISTRICT OF COLUMBIA, ss:

The Honorable Judges of the Municipal Court, D. C., by virtue of the annexed writ, to said court delivered, do hereby certify the record and proceedings in the suit in the writ mentioned, unto the Supreme Court of the District of Columbia, together with all things touching the same, as fully and wholly as the same are now depending before said Municipal Court.

Witness the Honorable Judges of said Court, this 24th day of January, A. D. 1916.

F. G. AUKAM,
Clerk,

By BLANCHE NEFF,
Assistant Clerk.

Costs paid by Plaintiff, \$1.35.

Costs paid by Defendant, \$.50.

In Municipal Court of the District of Columbia.

NEW ARCADE COMPANY, a Corporation under and by Virtue of the
Laws of Delaware,

vs.

ERNEST V. OWENS.

WASHINGTON CITY,

District of Columbia, ss:

Joseph Sanders, being first duly sworn, on oath says that he is the President of the New Arcade Company the plaintiff in the above entitled suit; that Ernest V. Owens the defendant in said suit, is indebted to said plaintiff in the sum of \$181.50, for storage charges for cold storage furnished by the plaintiff to the defendant at the latter's request, the said storage being of the kind and quality ordered by the defendant and being the same described in an item-
5 ized statement of account annexed hereto and marked "Exhibit A," to which reference is hereby made; that the said storage charges are of the value shown by said statement, and the said sum of \$181.50 with interest from the 2nd day of December, 1915, is due and owing by the defendant to the plaintiff by reason of the premises, and the defendant has no set off or just defense thereto.

J. SANDERS,
President.

Subscribed and sworn to before me this 3rd day of January, 1916.

[SEAL.]

ROBERT S. STUNZ,
Notary Public, D. C.

EXHIBIT "A".

Mr. E. V. Owens, Dr.
To New Arcade Company.

Receipts.		Deliveries.
1915.		
Oct. 20. 350 crates celery.	Nov. 17. 20 crates celery @ 25¢	5.00
	22. 18 crates @ 45¢	8.10
	22. 18 crates @ 45¢	8.10
	22. 25 crates @ 45¢	11.25
	23. 18 crates @ 45¢	8.10
	24. 25 crates @ 45¢	11.25
	26. 50 crates @ 45¢	22.50
	26. 25 crates @ 45¢	11.25
	27. 25 crates @ 45¢	11.25
	27. 10 crates @ 45¢	4.50
	29. 18 crates @ 45¢	8.10
	29. 25 crates @ 45¢	11.25

		29.	31 crates	@ 45¢	13.95
		29.	35 crates	@ 45¢	15.75
		29.	2 crates	@ 45¢	.90
	Dec.	2.	5 crates	@ 45¢	2.25
			350 crates		\$153.50
Oct. 25.	30 crates celery	Nov.	4. 12 crates	@ 25¢	3.00
			8. 18 crates	@ 25¢	4.50
Oct. 26.	82 crates celery	Nov.	8. 25 crates	@ 25¢	6.25
			8. 7 crates	@ 25¢	1.75
			11. 15 crates	@ 25¢	3.75
			15. 15 crates	@ 25¢	3.75
			15. 20 crates	@ 25¢	5.00
	462 crates celery.		462 crates		\$181.50

6

Declaration.

Filed February 4, 1916.

In the Supreme Court of the District of Columbia.

At Law. No. 58,771, Docket 63.

NEW ARCADE COMPANY, a Corporation under and by Virtue of the
Laws of Delaware, Plaintiff,

vs.

ERNEST V. OWENS., Defendant.

I. The plaintiff sues the defendant for money payable by the defendant to the plaintiff for that during the month of October 1915 the defendant engaged cold storage from the plaintiff for a consignment of celery and promised to pay therefor at the rates established for such service by the plaintiff which is in the cold storage business to-wit: to pay for such storage and refrigeration 25 cts a crate for the first month or fraction thereof and 20 cts a crate for each succeeding month or fraction thereof:

That during the month of October the plaintiff corporation, at defendant's request, took on cold storage four hundred and sixty two crates of celery; that within the first month one hundred and thirty two crates were withdrawn for which the defendant promised to pay at the rate of 25 cts a month and is indebted therefor in the sum of \$33; that during the second month the defendant withdrew three hundred and thirty crates for which he promised to pay at the rate of 45 cts and is indebted therefor in the sum of \$148.50.

That for the cold storage of the whole consignment of celery the defendant is indebted in the full sum of \$181.50 with interest from December 2nd 1915 payment of which has been duly demanded but the defendant wholly neglects and refuses to pay the same.

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II. And for money payable by the defendant to the plaintiff for goods bargained and sold by the plaintiff to the defendant; and for goods sold and delivered by the plaintiff to the defendant; and for work done and materials provided by the plaintiff for the defendant at his request; and for money lent by the plaintiff to the defendant and for money paid by the plaintiff for the defendant at his request; and for money received by the defendant for the use of the plaintiff; and for money found to be due from the defendant to the plaintiff on accounts stated between them.

And the plaintiff claims One Hundred and Eighty One and 50-100 Dollars (\$181.50) with interest at the rate of 6% per annum from the 2nd day of December 1915 according to the particulars in demand hereto annexed, besides costs of this suit.

S. HERBERT GIESY,
Attorney for Plaintiff.

The defendant is to plead hereto on or before the tenth day exclusive of Sundays and legal holidays occurring after service hereof; otherwise judgment.

S. HERBERT GIESY,
Attorney for Plaintiff.

Memorandum.

Bill of Particulars same as Exhibit A attached to Return to Writ of Certiorari.

8

Pleas.

Filed February 10, 1916.

* * * * *

The defendant for pleas to the declaration filed herein, and each and every count thereof, says:

First. That he is not indebted in manner and form as in said declaration alleged.

Second. That he did not promise in manner and form as in said declaration alleged.

Third. And for a further plea, defendant says, that the plaintiff at the commencement of the suit, was, and still is, indebted to him in the sum of One Thousand forty-five Dollars and ninety cents (\$1045.90), for that, and so forth, as appears by the particulars of said indebtedness hereto annexed, and defendant is willing that the same may be set off against the plaintiff's demand.

EDWIN C. DUTTON,
J. ENOS RAY, JR.,
Attorneys for Defendant.

Affidavit of Ernest V. Owens.

* * * * * * *

DISTRICT OF COLUMBIA, ss:

I, Ernest V. Owens, being first duly sworn, do depose and say, that I am the defendant in the above-entitled suit, and as such am fully acquainted with the facts in the case. That I am engaged in the commission business and the buying and selling for profit of provisions and vegetables in the City of Washington, District of Columbia. That it is true as stated by the plaintiff that affiant placed with the plaintiff four hundred and sixty two (462) crates of celery on or about the dates as set out in the plaintiff's bill of particulars and promised to pay therefor the rates as set out in plaintiff's declaration. It is also true that it was the duty of the plaintiff to so conduct and operate its cold storage and refrigerating rooms so that the celery received by the plaintiff on account of the defendant would not deteriorate in value or be damaged; but affiant says, and he expects to be able to prove at the trial, that the plaintiff so negligently and carelessly conducted, operated, and maintained, the room or rooms, within which the said celery of affiant was stored by the plaintiff, that is to say, the plaintiff failed to maintain that degree of cold which was necessary and proper for the preservation of the said celery, and because of its failure, as above stated, said celery became and was decayed and injured to such an extent that its market value was greatly depreciated and the defendant thereby suffered a loss in the sum of One thousand forty-five Dollars and ninety cents (\$1,045.90), as is more particularly set out in the bill of particulars hereto attached and made a part hereof.

Wherefore defendant claims that he has been damaged as aforesaid, in the sum of One Thousand forty-five Dollars and ninety cents (\$1045.90) exclusive of all set offs and just grounds for defense; and he is willing that the claim of the plaintiff of One Hundred eighty-one Dollars and fifty cents (\$181.50) be deducted from his claim as aforesaid and that he be given judgment for the sum of Eight hundred sixty-four Dollars and forty cents (\$864.40) with interest from the second day of December, 1915, besides costs of this suit.

ERNEST V. OWENS.

Subscribed and sworn to before me this 10th day of February, A. D. 1916.

[SEAL.]

WILLIAM K. QUINTER,
Notary Public, D. C.

Bill of Particulars.

Date.	No. crates.	Sold for.	Average market pr. for this grade of celery.	Total average price.	Net loss.
Nov. 4th.....	12	\$23.25	\$3.00	\$36.00	\$12.75
Nov. 8th.....	39	\$59.00	3.00	117.00	58.00
Nov. 9th.....	7	\$12.50	3.00	21.00	8.50
Nov. 11.....	15	\$26.00	3.00	45.00	19.00
Nov. 15.....	39	\$59.60	3.50	136.50	76.90
Nov. 17.....	21	\$35.50	3.50	73.50	38.00
Nov. 22.....	3	5.25	3.50	10.50	5.25
Nov. 23.....	28	\$51.25	3.50	98.00	46.75
Nov. 24.....	16	\$19.50	3.50	56.00	36.50
Nov. 26.....	44	\$74.00	4.00	176.00	102.00
Nov. 27.....	32	\$48.00	4.00	128.00	80.00
Nov. 29.....	34	\$60.50	4.00	136.00	75.50
Nov. 30.....	10	\$25.00	4.00	40.00	15.00
Dec. 1st.....	40	\$51.00	4.00	160.00	109.00
Dec. 2nd.....	79	\$84.50	4.00	316.00	231.50
Dec. 3rd.....	43	\$40.75	4.00	172.00	131.25
	462	\$675.60		\$1,721.50	\$1,045.90

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Memorandum.

June 19, 1917.—Verdict for defendant on plea of set-off against plaintiff for \$864.40 with interest from December 2d, 1915.

Supreme Court of the District of Columbia.

TUESDAY, September 11th, 1917.

Session resumed pursuant to adjournment, Hon. Walter I. McCoy, Justice presiding.

* * * * *

Come now the parties hereto by their respective attorneys of record; whereupon, the motion for a new trial filed herein is argued and submitted to the Court; upon consideration whereof, it is ordered that said motion be, and the same is hereby overruled and judgment on verdict is ordered. Wherefore, it is considered that the defendant herein recover of the plaintiff the sum of Eight Hundred Sixty-four and 40/100 Dollars (\$864.40) with interest thereon from the 2nd day of December 1915, together with costs of suit to be taxed by the clerk and have execution thereof.

From the foregoing, the plaintiff by its attorney of record, in open court, notes an appeal to the Court of Appeals; whereupon,
12 the penalty of a bond to operate as a supersedeas is hereby fixed in the sum of Twelve Hundred Dollars.

Memorandum.

September 13, 1917.—Supersedeas bond approved and filed.

Notice of Submission of Bill of Exceptions.

* * * * *

To Edwin C. Dutton, Attorney for the Defendant:

Please take notice that the above bill of exceptions will be presented to the Supreme Court of the District of Columbia in Criminal Court No. — before Mr. Justice McCoy for settlement on the 25th day of October 1917 at 10 o'clock A. M. or as soon thereafter as counsel can be heard.

S. HERBERT GIESY,
M. D. ROSENBERG,
Attorneys for Plaintiff.

Service of copy of above Bill of Exceptions and notice of settlement acknowledged this 16 day of October 1917.

EDWIN C. DUTTON,
Attorney for Defendant.

Notice of Settlement of Bill of Exceptions.

Filed October 25, 1917.

* * * * *

Please take notice that the bill of exceptions in the above entitled case will be presented to the Court for settlement on Thursday the 25th day of October 1917 before Mr. Justice McCoy holding Criminal Court No. 2 at 10 o'clock A. M. or as soon thereafter as counsel can be heard.

To Edwin C. Dutton & Tracy L. Jeffords, Attorneys for Defendant.

S. HERBERT GIESY,
M. D. ROSENBERG,
Attorneys for Plaintiff.

Service of copy of above notice this 23rd day of October 1917 is herewith acknowledged.

EDWIN C. DUTTON,
Attorney for Defendant.

Memorandum.

October 25, 1917.—Bill of Exceptions submitted.

Supreme Court of the District of Columbia.

WEDNESDAY, March 6th, 1918.

Session resumed pursuant to adjournment, Hon. William Hitz,
Justice presiding.

* * * * *

Before Judge McCoy.

The Court having this day signed the bill of exceptions taken at the trial of this cause as of the time of the noting thereof at the trial, now hereby orders the same of record, nunc pro tunc.

Assignment of Errors.

Filed April 13, 1918.

* * * * *

1. The admission in evidence of the paper writing purporting to be a record of the sales of the celery for the damage of which a recovery is sought in this case together with statement purporting to show the market price obtained for good celery on the day of the sales referred to, and which statement and record was not made at the time of the transaction.

2. The admission of hearsay evidence to prove the market value of celery at the time and times of sales as testified to in this case.

3. The admission in evidence of engineer's daily log being a part only of the deposition of Herbert V. Josey, a witness for the plaintiff, as part of the defendant's case in chief, as the introduction of the said daily log and the absence of the deponent, deprived plaintiff's counsel of the opportunity for cross-examination.

4. Refusing plaintiff's prayer numbered five and ruling that a case instituted in the Municipal Court and removed to the Supreme Court of the District of Columbia by certiorari is not limited as to the amount of recovery by the jurisdiction of the Municipal Court.

5. The refusal by the Court of all of plaintiff's prayers and charging the jury in general language and not in the specific instructions sought by the prayers.

S. HERBERT GIESY,
M. D. ROSENBERG,
Attorneys for Plaintiff.

Acceptance of service of the above Assignment of Errors, acknowledged this 12 day of April 1918.

JEFFORDS & DUTTON,
Attorneys for Defendant.

15

Designation of Record.

Filed April 13, 1918.

* * * * *

The Clerk will please prepare the transcript of the record in the above entitled case for the Court of Appeals and include therein
 Petition for Writ of of Certiorari
 Return to Writ of Certiorari and accompanying papers
 Declaration
 Pleas Affidavit and Bill of Particulars
 Minutes of trial, verdict and judgment notice of appeal and fixing of bond
 Eight day notice of tendering of Bill of Exceptions
 Two day " " " " " "
 Assignment of Errors

S. HERBERT GIESY,
 M. D. ROSENBERG,
Attorneys for Plaintiff.

To Edwin C. Dutton and Tracy L. Jeffords, Attorneys for Defendant:

Please take notice that the above designation of the transcript of record for the Court of Appeals has been filed with the Clerk this day.

S. HERBERT GIESY,
 M. D. ROSENBERG,
Attorneys for Plaintiff.

Service of copy of the above designation of record and notice acknowledged this 12 day of April 1918.

JEFFORDS & DUTTON,
Attorneys for Defendant.

Memorandum.

April 22, 1918.—Time to file transcript of record extended to April 25, 1918.

16

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 15, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript in cause No. 38264 At Law, wherein New Arcade Company, a corporation under and by virtue of the laws of Delaware, is Plaintiff, and Ernest V. Owens is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 23rd day of April, 1918.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG,
Clerk.

17 In the Supreme Court of the District of Columbia.

At Law. No. 58,771. Docket 63.

NEW ARCADE Co., a Corporation under and by Virtue of the Laws
of Delaware, Plaintiff,

vs.

ERNEST V. OWENS, Defendant.

Bill of Exceptions.

This cause came on for trial before Mr. Justice McCoy and a Jury on the 15th, 18th and 19th days of June, 1917.

On motion of the plaintiff the Court ruled that defendant by his pleadings had admitted the indebtedness to the plaintiff and pleaded a set off thereto and the burden of proof was upon the defendant on the set off.

Whereupon the defendant, Ernest V. Owens, was sworn and gave evidence tending to prove that in October, 1915, there arrived in Washington consigned to him several car loads of celery and when he attempted to put them in the cold storage of the Terminal Storage Company they were filled up and were unable to take it and thru his employees, J. W. Bowen his bookkeeper and John A. Davis, he called upon the New Arcade Company and arranged for the storage of the celery there.

It was in fine condition when it came out of the refrigerating car. I did not go myself to the Arcade Co. There was some arrangement made about taking a room, but later on I decided not to take the room, but to pay monthly, monthly by the crate. The celery came out of the car today, to-morrow and the next day. Celery sent to the Arcade was from different cars from that sent to the Terminal. It was taken from a refrigerator car at 12th St., in the fall when you put celery away. It came in over the Pa., hauled it in an open wagon from refrigerator car, but did not know the temperature the day it was hauled. The first celery was hauled Oct. 20, 350 crates. They were to take care of the celery. I sent men up there to help pack it. I only sent a couple of men to assist Leishear's men. When it came out of storage it looked as though it had been in a fire.

18 Tops burned up. I had to sell it, I got around \$1.50 to \$1.25 a crate. We made records of it. These are the records

of the sales. The exact amount received for the celery. These three sheets contain the records of the sales and were made from the tickets.

This record was objected to by Mr. Giesy as not being an original entry or made by witness himself at time of sale.

Admitted subject to objection. Decision reserved.

Exception noted.

Q. Were these records made at the time of the sale? A. By original from the tickets that were taken. The tickets were lost, some we have, some we have not. I have a gentleman that copied these, Mr. Davis.

Q. Do you know the value and price of celery if this had not been damaged? A. At the time, from \$3.50 to \$4.00 per crate. The market varies. The market varies, today it may be \$3.50, tomorrow \$4.00.

Q. Did you make any record at the time of sale of this celery as to what it should have brought and did? A. Yes, we did.

Q. How did you determine this? A. I went down the line and asked different people what they got for good celery. They said from \$3.50 to \$4.00.

Q. Did you sell any other celery besides that stored at the Arcade? A. No, I saved my good celery. I wanted to get rid of the junk I got at the Arcade, first.

Q. How did you determine the market price? A. I was posted, watching market quotations and noticing what different people said.

Q. Whether or not this paper was gotten up at the time this celery was sold? A. This is the paper the notes were made from.

Q. Did you take the figures down? A. I did not, my book-keeper did.

Objected to as heresay and not the proper way to prove market value.

Objection overruled.

Exception noted.

Cross-examination:

Took it to the Arcade Storage because he could not get room at the Terminal. A man told him that celery stored at the Arcade came from the same field as that stored at the Terminal but it came from a different car. Only knew of his own knowledge he bought it from the same man. When he was through with work went to 12th St. Freight Yard about hauling celery to the Arcade. That when celery went in Arcade Market it was in first class condition.

19 Q. How do you know? A. I dropped in there a couple of evenings when they were unloading.

Q. Is that the only time? A. I went down to the car to attend to some business and saw the celery, it was fine.

Q. Did you not state to Mr. Sanders over the "phone and also at your place of business that part of the celery was in a damaged condition and would have to be stored so that it could be taken out at once? A. No, sir.

Q. Did you make any complaint to the Arcade Co.? A. I might have said something to them.

Q. Are you able to say, Mr. Owens, that celery taken from the refrigerator car, put in an open wagon on the 20th of Oct., taken three miles to the Arcade, would not be damaged? A. Not if it would stay on all day.

Q. When the celery arrived at the Arcade who packed it? A. Why everybody tried to pack it. They had no men.

Letter dated Oct. 20 addressed to witness was produced under notice to produce and was admitted by defendant's counsel and was read to witness, offered in evidence and read as follows:

Oct. 20, 1915.

Mr. Ernest V. Owens, 935 B St. N. W., Washington, D. C.

DEAR SIR: This is to confirm our arrangement, that you are taking our room "C" of the Cold Storage Department, approximately 48 ft. x 19 ft. x 19 ft. for storage of celery, apples, etc., from Oct. 19th to Dec. 31st, 1915 inclusive, at a rental of \$100. per month, Oct. being pro-rated, rent to be paid monthly in advance.

We agree to keep the storage cool and furnish necessary current for light, temperature to be between 32 degrees and 36 degrees Fahr. but you to attend to all handling.

20 The watchman is constantly on the grounds and will *will* permit any man authorized by you to place in or take out your goods at any time or if you prefer you may have a special lock in which event, however, some one here must have a key to permit the reading of the temperature daily.

Should you desire to continue this room after the 31st of Dec. 1915, all of the conditions shall be the same as for the term
21 heretofore agreed upon, it being understood, however, that a fractional part of a month shall be counted as a full month.

Yours very truly,

NEW ARCADE COMPANY,
JOSEPH SANDERS,

President.

Please acknowledge this letter for our files.

Letter of Oct. 22 not produced and its receipt not admitted.

Plaintiff's copy read to witness as follows:

Oct. 22, 1915.

Mr. Ernest V. Owens, 935 B Street N. W., Washington, D. C.

DEAR SIR: In conformity with the advice from you, by messenger, that you do not wish to take the Cold Storage room as originally agreed, we are changing our books accordingly and instead of you paying for the room by the month, you will be charged as per our regular rules for each crate of celery placed in at the rate of 25c for the first month and 20c per mo. thereafter. Fractional part of the month as a whole month. We are herewith sending you a receipt for same.

As we left the stacking and arrangement to your men, with the understanding that you were taking the room, we of course, will not be responsible for any damage done to that placed in the storage by you.

Yours very truly,

NEW ARCADE COMPANY,
J. SANDERS, *President*.

That he did not open letters at his office. Was not able to say he had read it. That he delivered the celery at the curb, helped put it away with his men, sent men up there to help pack it, to assist Leishear's men, did this to help the Arcade market people. Celery was stored in 3 different lots, 350 crates, 30 crates and 82 crates, at different times. Saw most all of them, saw 3 or 4 anyway. Examined all of them when they came out of the car, did not examine all at the Arcade, did not give any examination at the Arcade. Celery should be packed tight; there is not any space for air, it is all packed in. That the following sale tickets were made by witness at the time sales were made by him and are in his hand-writing:— Had no other celery on sale at this time. Had been in the market business many years and knew the quality and price of celery at this time.

1209 C N. W.,	3 C. Sd.	7.50	Paid	
1210 N N. W.,	1 C. Sd.	3.50	"	
22				
1209 C N. W.	1 C. Sd.	10.50	Paid	
224 G N. W.	3 C. Sd.	4.50	"	
229 F N. W.	1 C. Sd.	3.00		
224 John	17 C. Sd.		C. O. D.	
		21.25		
		5.	16.25	
Welsh & N N. W.	1 C Sd.		1.75	Paid Nov. 10.
620 Essay	9 C Sd.			
		15.75		
		2.00	13.75	" Nov. 29.
347 Monroe	17 C Sd.			
		34.00		
		5.00	29.00	C. O. D.
1312 D N. W.	10 C Sd.		10.	Paid
14 P N. W.	2 C Sd.		5.00	"
21 N St. N. W.	1 C Sd.		3.00	"
1209 C	3 C Sd.		6.00	"
218 4 St. N. W.	2 C Sd.		6.00	"

Whereupon the defendant further gave evidence by his witness JOSEPH W. BOWEN, tending to prove that he had been in the market

business for a number of years, and made the sales of celery indicated by the following tickets which were in his handwriting. The celery was not right and we had to get rid of it first:

Nov.	4	G. A. Farr	1 crt.	celery	1.75	chg.
"	8	L. A. Fountaine	10 "	"	16.	"
"	9	Remo Bal	1 "	"	2.00	"
"	10	1458 P St. N. W.	1 "	"	1.75	C. O. D.
"	10, 1915	Geo. Farr	2. "	"	3.25	Chg.
"	17	347 Md. Ave.	2 "	"		
					3.50	
			Cash	2.-	1.50	C. O. D.
"	17	620½ Essex Court	6 Crt.	celery		
					10.	
			Cash	7.	3.00	"
11	17, 1915	634 Eye St., N. W.	1 Crt.	celery	7.00	"
Nov.	22	Remno Bro.	3 "	"	5.25	Chg.
"	23,	1209 C St.	2 "	"	3.50	Pd.
"	22,	1219 C St. W	23 "	"		
					40.25	
			Cash	5.	35.25	C. O. D.
"	23,	214 Jackson Wall Aly	1 Crt.	celery	2.25	Pd.
"	23,	Boswell	1 "	"	2.75	Chg.
"	24,	49 F St., N. W.	1 "	"	1.75	Pd.
"	24,	216 Jackson Wall	2 "	"	3.50	Pd.
"	26,	Remno Bro.	1 "	"	2.00	Chg.
"	26,	Remo "	2. "	"	5.00	"
"	28,	"	9. "	"	15.75	Pd.
"	29,	601 L St. S. E.	1 "	"	2.00	Pd.

Nothing in the sales tickets to identify the celery as coming from the Arcade, but they had no other celery to sell.

Whereupon the defendant further gave evidence tending to prove by his witness JOHN A. DAVIS that the following sales tickets are in his hand writing and are offered in evidence:

11- 8-191	McW & Berger	1 cr	celery	2.00	chg.
" 1915	1312 D	7 cr	"	12.25	pd.
11- 9-191	Lalegar	1 cr	"	2.00	C. O. D.
11-10-1915	Simny	1 cr	"	1.75	pd.
11-11-191	224 J Mall	15 cr	"		
				26.	
		cash	10.	16.00	C. O. D.

11-15-1915 224 J Mall	19	"	28.50	
			5.00	23.50 "
11-15-1915 315-13½	3	celery	5.25	pd.
23				
11-15-1915 1312 D	15	Celery	22.50	pd.
11-15-1915 Simny	1 cr	"	1.50	"
11-15-1915 "	1 "	"	1.75	"
11-17-191 620½ Essex Ct	3 cr	celery	5.00	"
11-17-191 347 Md. Ave. S W	3 "	"	5.	
	cash	2.	3.00	C. O. D.
11-17-1915 " " " "	3 cr	celery	5	
	cash	2	3.00	"
11-28-1915 1438 P St. N W	1 cr.	celery	2.50	"
11-24-1915 1417 G St. N W	1 cr.	celery	2.25	"
11-25-1915 212 J R Alley	12	"	12.00	Pd.
11-26-1915 738 6 St., N W	8	"	14	
	cash	5	9.00	C. O. D.
11-26-1915 500 Maine Ave S W	8 cr.	celery	14.	
	cash	5	9.00	C. O. D.
11-21-1915 1209 C	32	celery	44.80	
			10.	34.80 "
11-29- 15 211 D N W	10	"	18.	pd.
11-29-191 218 4½	5	"	9.	"
12- 1-1915 1134 7 N W	10 cr	"	8.00	"
12- 2-191 312 D N W	4	celery	8.	"

That he had been in the fruit and produce business for 25 years, that he went to the Arcade at the request of Mr. Owen who asked him to see if they had a room to take this celery after being turned down at the Terminal Storage Company. We were looking for a place for storage; saw Mr. Smoot, told him that Mr. Owen had celery to store; Mr. Smoot showed witness a room and he said he

could take the celery; showed him a large room; told him he could put the cold air right on it, and we could send the celery right up; does not remember whether Smoot agreed to pack the celery; did not think it was necessary to have any arrangement about packing; told Smoot we had three or four cars of celery and he Smoot said; bring it right up; 460 crates were sent up there.

Q. Did Mr. Smoot at that time tell you you could bring three or four car loads at once to the storage? A. He did not. We brought 350 crates.

Q. Did Mr. Smoot tell you to bring such a number at that time? A. He said bring the celery up and they would take care of it, that is the way I understood it.

When this celery went in the Arcade it was in very good condition, what you might call first-class; when it came out it was in a very bad condition, what you might say rotten.

We brought 350 crates at one time; that he told Mr. Owens that there should be some record of the regular market price of good celery. I made the record.

Q. How did you make them? A. Well we take the day we took the celery out. I found out the price of good celery; made notes on slips and copied it on the typewriter.

Q. Do you keep duplicate slips? A. No.

Q. Is that part of your regular duty? A. No, I have nothing to do with it.

24 Q. How do you sell crates of celery, and how do you keep record of it. A. We sell crates of celery for cash, there is no record made when we get cash for it.

Q. When do you make records? A. When we have celery to deliver or charge. That the tickets (testified to above) are C. O. D. or charge sales: "when we make cash sales there are no tickets."

Q. Can you tell what this record is? A. This is the record of celery that came out of the Arcade storage.

Q. What did you make it from? A. From sales slips.

Q. How were such records kept? A. I made little notations and after all were sold I copied it myself on these three sheets; I know the price we have here is about the average price of good celery; the average is a fair average.

Q. This paper then was made after the celery was sold and the Memorandums you had destroyed.

— . — .

By the Court: Do you know Mr. Davis that the prices were correct at the time the paper was made?

A. Yes.

Objected to by Mr. Giesey. For the reason, first, the original entry was the slips and it does not appear that the paper offered in evidence was made at the time of the transaction, but was compiled afterwards and secondly it is not competent testimony to prove market value and inadmissible for such purpose.

Whereupon the following three sheets were admitted over objection of plaintiff's counsel and Exception noted.

Nov. 11th.	15 crates celery	\$26.00	Average market price on this date.	
			15 crates celery 3.00	45.00
			39 " sold for	26.00
			Loss of	19.00

Nov. 15th.	1 crate celery	\$1.75	Average market price on this date.	
"	"	1.60	39 crates celery 3.50	136.50
"	"	22.50	39 " sold for	59.60
"	"	5.25	Loss of	76.90
		28.50		
		59.60		

Nov. 17th.	4 crates celery	\$7.00	Average market price on this date.	
"	"	10.00	21 crates celery 3.50 crt.	73.50
"	"	3.50	21 " sold for	35.50
"	"	5.00	Loss of	38.00
"	"	5.00		
"	"	5.00		
		35.50		

Sheet No. 2.

Nov. 22nd.	3 crates celery	\$5.25	Average market price on this date.	
			3 crate- celery \$3.50 crt.	10.50
			3 " sold for	5.25
			Loss of	5.25

Nov. 23rd.	1 crate	celery	\$2.75	Average market price on this date.	
"	1	"	2.50	28 crates celery \$3.50 crt.	98.00
"	1	"	2.25	28 " sold for	51.25
"	23	"	40.25		
"	22	"	3.50	Loss of	46.75
26	28		51.25		
Nov. 24th.	1 crate	celery	\$2.75	Average market price on this date.	
"	1	"	1.75	16 crates celery \$3.50 crt.	56.00
"	2	"	3.50	16 " sold for	19.50
"	12	"	12.00		
	16		19.50	Loss of	36.50
Nov. 26th.	8 crate-	celery	\$14.00	Average market price on this date.	
"	8	"	14.00	44 crates celery \$4.00 crt.	176.00
"	10	"	10.00	44 " sold for	74.00
"	17	"	34.00		
"	1	"	2.00		102.00
	44		74.00		
Nov. 27th.	32 crate-	celery	\$48.00	Average market price on this date.	
				32 crates celery \$4.00 crt.	128.00
				32 " sold for	48.00
				Loss of	80.00

Nov. 29th.	1 crate	celery	\$2.00
"	5	"	9.00
"	10	"	18.00
"	9	"	15.75
"	9	"	15.75
	<u>34</u>		<u>60.50</u>
		Average market price on this date.	
	34 crates celery	\$4.00 crt.	136.00
	34 "	sold for	60.50
		Loss of	<u>75.50</u>

Sheet No. 3.

Nov. 30th.	2 crates	celery	\$6.00
"	3	"	6.00
"	1	"	3.00
"	2	"	5.00
"	2	"	5.00
	<u>10</u>		<u>25.00</u>
		Average market price on this date.	
	10 crates celery	\$4.00 crt.	40.00
	10 "	sold for	25.00
		Loss of	<u>15.00</u>

Dec. 1st.	10 crate-	celery	\$8.00
"	12	"	18.00
"	18	"	25.00
	<u>40</u>		<u>51.00</u>
		Average market price on this date.	
	40 crates celery	\$4.00 crt.	160.00
	40 "	sold for	51.00
		Loss of	<u>109.00</u>

Dec. 2nd.	4 crate	celery	\$8.00
"	38	"	47.50
"	12	"	9.00
"	25	"	20.00
	<u>79</u>		<u>84.50</u>
		Average market price on this date.	
	79 crates celery	\$4.00 crt.	316.00
	79 "	sold for	84.50
		Loss of	<u>231.50</u>

Dec.	3rd.	10	crate-	celery	\$10.00	Average market price on this date.	
"	"	12	"	"	15.00	43 crates celery \$4.00 crt.	172.00
"	"	21	"	"	15.75	43 " " sold for	40.75
		<u>43</u>			<u>40.75</u>		
						Loss of	<u>131.25</u>

27 Whereupon the defendant further gave evidence by his witness J. F. JOHNSON tending to prove that Johnson was the superintendent of the Terminal Storage Company; was not an expert on cold storage but had practical experience 13 years in storage business and the proper temperature for the preservation of celery was 31 degrees. Certain years no celery will keep, but kept in good shape in 1915. He always carries celery below 32 degrees to keep it.

Whereupon the defendant further gave evidence by his witness, NICHOLS, who was in the commission business next to Owens, that, at Mr. Owens' request, he went with someone to the Arcade cold storage and examined room in which celery was stored. That the floor of the room was muddy.

Whereupon the defendant by the deposition of Plaintiff's witness HERBERT V. JOSEY gave testimony tending to prove that the temperature of the room in the Arcade in which the celery had been stored was clearly indicated by the log signed by him and attached to his deposition.

Objected to by counsel for plaintiff on the ground that the deposition of Josey was the deposition of Plaintiff's witness, and that on the case made out by the defendant on the setoff he would make a motion to take from the jury. The logs would make explanation thereof necessary and the defendant could not use plaintiff's evidence unless he made Herbert V. Josey his own witness. He could not do that by using the deposition.

The objection was overruled by the Court and the defendant permitted to put in evidence the logs attached to the deposition of Josey as part of the defendant's case.

To which ruling the plaintiff then and there excepted.

The logs were offered in evidence to the following effect:

28

Herbert V. Josey,
The Arcade Ice Plant.
Engineer's Daily Log.

			P. M.			A. M.						P. M.		
			8	10	12	2	4	6	8	10	12	2	4	6
October	22, 1915.	Room C	40	40	40	40	40	40	40	40	40	40	40	40
"	23, 1915.	"	38	38	38	38	38	38	38	38	38	38	38	38
"	24, 1915.	"	38	38	38	38	38	38	38	38	38	38	38	38
"	25, 1915.	"	36	36	36	36	36	36	36	36	36	36	36	36
"	26, 1915.	"	36	36	36	36	36	36	36	36	36	36	36	36
"	27, 1915.	"	38	38	38	38	38	38	38	38	38	38	38	38
"	28, 1915.	"	38	38	38	38	38	38	38	38	38	38	38	38
"	29, 1915.	"	38	38	38	38	38	38	38	38	38	38	38	38
"	30, 1915.	"	38	38	38	38	38	38	38	38	38	38	38	38
"	31, 1915.	"	38	38	38	38	38	38	38	38	38	38	38	38
Nov.	1, 1915.	"	38	38	38	38	38	38	38	38	38	38	38	38
"	2, 1915.	"	36	36	36	36	36	36	36	36	36	36	36	36
"	3, 1915.	"	36	36	36	36	36	36	36	36	36	36	36	36
"	4, 1915.	"	36	36	36	36	36	36	36	36	36	36	36	36
"	5, 1915.	"	36	36	36	36	36	36	36	36	36	36	36	36
"	6, 1915.	"	36	36	36	36	36	36	36	36	36	36	36	36
"	7, 1915.	"	34	34	34	34	34	34	34	34	34	34	34	34
"	8, 1915.	"	35	35	35	35	35	35	35	35	35	35	35	35
"	9, 1915.	"	34	34	34	34	34	34	34	34	34	34	34	34
"	10, 1915.	"	33	33	33	33	33	33	33	33	33	33	33	33
"	11, 1915.	"	34	34	34	34	34	34	34	34	34	34	34	34
"	12, 1915.	"	34	34	34	34	34	34	34	34	34	34	34	34
"	13, 1915.	"	34	34	34	34	34	34	34	34	34	34	34	34
"	14, 1915.	"	34	34	34	34	34	34	34	34	34	34	34	34
"	15, 1915.	"	34	34	34	34	34	34	34	34	34	34	34	34
"	16, 1915.	"	34	34	34	34	34	34	34	34	34	34	34	34
"	17, 1915.	"	35	35	35	35	35	35	35	35	35	35	35	35
"	18, 1915.	"	34	34	34	34	34	34	34	34	34	34	34	34
"	19, 1915.	"	36	36	36	36	36	36	36	36	36	36	36	36
"	20, 1915.	"	36	36	36	36	36	36	36	36	36	36	36	36
"	21, 1915.	"	36	36	36	36	36	36	36	36	36	36	36	36
"	22, 1915.	"	36	36	36	36	36	36	36	36	36	36	36	36
"	23, 1915.	"	36	36	36	36	36	36	36	36	36	36	36	36
"	24, 1915.	"	36	36	36	36	36	36	36	36	36	36	36	36
"	25, 1915.	"	36	36	36	36	36	36	36	36	36	36	36	36
"	26, 1915.	"	34	34	34	34	34	34	34	34	34	34	34	34
"	27, 1915.	"	34	34	34	34	34	34	34	34	34	34	34	34
"	28, 1915.	"	34	34	34	34	34	34	34	34	34	34	34	34
"	29, 1915.	"	33	33	33	33	33	33	33	33	33	33	33	33
"	30, 1915.	"	34	34	34	34	34	34	34	34	34	34	34	34

29 Whereupon the plaintiff to sustain the issues on his part joined gave evidence by his witness JOHN J. SMOOT tending to prove that in October 1915 he was Superintendent of the Arcade, had charge of the cold storage. Mr. Davis representing E. V. Owens called and asked him to take care of some celery. He showed Davis two or three rooms which he had empty; Davis asked him what it would be worth by the month; told him he would have to see Mr. Sanders; took him to Mr. Sanders; he made arrangements with him for Room C; there was nothing said about temperature; told him in sending it up to be careful not to send too much at a time; not to send it up too fast; this was two or three days before the first arrived. I said to Mr. Davis don't send more than one wagon load at a time; I might have said something then about temperature due to opening and closing doors; when it came there was several wagon loads; started about three or four o'clock in the afternoon; some ten or twelve loads; worked very late that night; storing was done by the drivers and helpers that Mr. Owens and Mr. Davis sent there. They asked me to give them some additional help; did not volunteer the help; all I could get for help was some market men.

Q. When the celery was put in storage did you say anything about packing? A. I do not think I did.

Nobody superintended the packing. I just checked the crates as they came off the wagon; 350 crates when the celery arrived the room was clean and absolutely empty; after the celery arrived in this quantity I had a conversation over the phone with Mr. Owens. I think they said he was there; I talked with Mr. Owens' office. When I found they were sending as fast as they were and the door had to be kept open continually, I knew that the temperature would be running up. I told them that the door had to be kept open continually; that the temperature would be running up; that they were entirely too fast and much faster than arrangements with Mr. Davis had been made for; and they must do something to prevent the celery coming so fast. When the celery arrived it was in a very poor condition judging from the celery I have handled; a lot of crates were in bad condition, lids being broken; some of the crates were broken into pieces getting them in; I should say between ten and fifteen; the other crates were in a fair condition, they would hold the celery; first receipt of celery was 350 crates; opening doors has a tendency to increase the temperature; the withdrawals were always at the request of Mr. Owen.

The three receipts shown witness were the ones issued by him for the celery as received and were identified by him and offered in evidence. They are as follows:

The Arcade Storage.

Date October 20th, 1915.

Received of E. V. Owens
Residing at —,

The following goods for storage in the refrigerated rooms under the company's regulations:

350 crates celery.

Payment to be made before removal of goods at the following rates:

25 cents per crate per Mo. 1st Mo. 20 cents per crate per month thereafter, 191—; thereafter at —.

THE ARCADE STORAGE,
By J. D. SMOOT.

(On Back of Receipt.)

Regulations.

The company will be responsible only for temperature of the rooms which unless otherwise agreed shall be kept within the limits recommending by authorities on refrigeration.

The storage term begins with the receipt of the first package. Fractional parts of months will be charged as full months.

Contracts at season rates will not be modified no matter how short a time the goods remain in storage. Monthly rates will be charged after the expiration of a term or season contract.

When goods in storage are transferred on the books from one party to another the storage bill must be paid and a new contract drawn.

Goods shall not be removed until this receipt has been returned to the company and charges paid in full.

The company reserves the right to require the removal of goods stored by the month on thirty days' notice by mail.

Nov. 22 out celery 25 crates
Nov. 22 out celery 18 crates
Nov. 22 out celery 25 crates
Nov. 23 out celery 18 crates
Nov. 24 out 25
Nov. 26 out 25
Nov. 26 out 25
Nov. 26 out 25
Nov. 27 out 25
Nov. 27 out 10
Nov. 29 out 18
Nov. 29 out 25
Nov. 29 out 31
Nov. 29 out 35

31 *Receipt for Goods Stored in Refrigerated Rooms.*

The Arcade Storage.

Date Oct. 25, 1915.

Received of E. V. Owens
Residing at —,

The following goods for storage in the refrigerated rooms, under the Company's regulations:

30 crates celery.

Payment to be made before removal of goods at the following rates:

25¢ per crate per mo. 1st mo. and 20¢ per crate per mo. thereafter.

THE ARCADE STORAGE,
By J. D. SMOOT.

(Regulations as on 1st receipt.)

Nov. 4 out 12x. J. M. S.

Nov. 8 " 18x. J. M. S.

Receipt for Goods Stored in Refrigerated Rooms.

The Arcade Storage.

Date Oct. 26, 1915.

Received of E. V. Owens
Residing at —,

The following goods for storage in the refrigerated rooms, under the Company's regulations:

82 crates celery @ 25¢ per mo. per crate 1st mo. 20¢ per crate per mo. thereafter.

Payment to be made before removal of goods at the following rates:

THE ARCADE STORAGE,
By J. D. SMOOT.

This receipt must be surrendered and charges paid before goods are removed.

(Regulations as on 1st receipt.)

Nov. 8th 25x crates out

" " 7x " "

" 11th 15x " "

" 15th out 15x crates

" " " 20x "

" 17th " " "

That the entries on the back were the original memorandums made on the receipts at time of withdrawals of defendant and were made by witness. That there was 1 crate of the celery left. Does not remember how long but close to Christmas or New Year. Showed this crate to Mr. Tassa, Mr. Kammerer and Mr. Cerami.

Cross-examination:

The telephone conversation was late in the afternoon.

Whereupon the plaintiff further gave evidence by its witness, JOSEPH SANDERS, tending to prove that Mr. Sanders was an engineer and inventor and President of the New Arcade Co. That he had dealings with Mr. Owens about the storing of some celery in the Arcade. That one of Mr. Owens' representatives called and wished to know whether they could store some celery and under what conditions. I wrote them a letter stating that in conformity with
32 our conversation, it was all right to store the celery.

Identifies copy of letter of Oct. 22 as a correct copy of letter signed and mailed by him.

Whereupon the plaintiff to prove the issues by it joined by its witness GEO. C. ROGERS, gave evidence tending to prove that he was Sec'y & Treas. of the New Arcade Co. that he took from dictation from Mr. Sanders, a letter to Mr. Owens of which the copy identified by Mr. Sanders was a correct copy.

(This is the letter of Oct. 22nd shown to Mr. Owen and appearing in the record on Pg. 4.)

That Mr. Sanders signed the original and witness addressed it to the address given in the letter, 935 B St., N. W., Mr. Owens' address and put it in a return envelope, marked with the name of the New Arcade Co., placed the proper postage upon it and mailed it.

Whereupon Mr. SANDERS being recalled further gave evidence tending to prove that he advised Mr. Owens not to send the celery by telephoning him not to send it more than one wagon at a time, advised him so in his, Owens', interest, as he was taking the responsibility, called him up when the first lot of celery came. He told me over the phone to advise his drivers to store a certain part of the celery near the front. I got the message myself over the phone and transmitted it to Mr. Smoot. He stated it was over-ripe and should be stored in the corner near the front where it could be easily taken out", that as soon as they were advised the celery was coming up he directed the cold air to be turned on, has no expert knowledge, but has handled cold storage and knows that celery should be kept at 32 to 36°. "If you get to near the freezing point then the climatic conditions might drop a degree before you could catch it. The freezing point of celery is 32°." Mr. Sanders being offered the book on cold storage by Mr. Madison Cooper stated that he was an authority on cold storage. Pg. 787 states: that the proper temperature is from 32° to 34°. With this knowledge we made the contract and took no responsibility nor

33 did we undertake to examine every crate; that the temperature is affected by taking in and out of goods as the opening of the doors permits the entry of warm air, that the effect of putting in 350 crates on the room is to run up the temperature, that of his personal knowledge to meet the situation created by putting in 350 crates of celery, all the brine was turned on to reduce the temperature and we notified Mr. Owens by phoning that he was sending the celery up too fast and it would take time to reduce the temperature, notified Mr. Owens not to send more than one wagon load at a time, more than one car load at a time. Owens stated that a carload would be 60 to 80 crates and instructed them to bring a wagon load at a time. He gave testimony tending to prove that he saw celery all over the sidewalk on the day of the arrival of the first load. Several wagon loads came at one time, in order to put the celery in we had to let some of our men out of the market to help; told Mr. Owens that he would have to pack it; there seems to be a difference of opinion about packing, but the ideal way is to have air circulating all around it, but that was not generally known at that time. Owens simply stored one crate on top of the other. Owens' men packed it in the usual way, but I suggested they leave more space. Notified Mr. Owens that we would not be responsible for the celery. The last crate withdrawn by Mr. Owens was on Dec. 2, 1915. One crate was left in storage and although notified by letter, Mr. Owens never came for it. No complaint was ever made by Mr. Owens until we were pushing him for storage fees and we threatened to take legal steps. Then he stated he had a claim against us. That in agreeing by the letter of Oct. 20, 1915 to keep the temperature in the Room C between 32° and 36°, he did so after consulting "Madison Cooper" an authority on cold storage which is kept in their office for reference on cold storage and guidance. On page 787 of which it states:

The storage of celery varies a great deal in different places. In some of the large cities celery is kept in storage the year round. Generally, however, celery is stored early in the fall or on maturity of the plant, and the goods are not placed in storage until the ground freezes in the fall. A temperature of as near the freezing point as possible is recommended. Celery storage rooms are usually held at from 32° to 34° F. The keeping qualities vary with the different

34 varieties and condition of the goods. Hardy varieties and "green top" keep well for three months or possibly more.

Some of the varieties will not keep longer than from one to two months. Celery after being trimmed, or what is known as "dressed goods", will not keep for any length of time. A few days only being about the limit.

Neither Mr. Owen or either of his employees, Davis and Bowen ever talked about temperature or stated what temperature they wanted or complained that the proper temperature was not being maintained.

Whereupon the plaintiff further gave evidence tending to prove by its witness ERNEST M. MERRICK that he was a commission merchant and dealt in celery, not an expert but had some knowledge. Had heretofore stored celery in cold storage but it was very risky to keep and he had had such bad results he no longer purchased celery to

store; that green celery will keep better than ripe celery. The success of keeping celery in cold storage depended on the condition of the celery and that it varied from season to season. It was a most difficult vegetable to keep in cold storage.

Cross-examination:

He was not an expert in cold storage. His experience was that of a commission merchant who dealt in celery. He understood from information, he had received, that the proper temperature for celery was 31°.

Whereupon plaintiff gave evidence by its witness THOMAS TASSA tending to prove that he was a dealer in fruits and vegetables and had for ten years purchased and sold celery as a retail dealer in the city of Washington. That he was shown a crate of celery at the New Arcade Co. in their storage in the presence of Mr. Levi Fritchman and that this celery was in a condition which is not unusual to find after being stored for some months. That such celery was worth on or about the 20th day of Oct. 1915 not over \$2.50 a crate. That he examined said celery very carefully and states that he has often seen celery from cold storage in much more unsalable condition and was worth not less than \$1.75 the day of the examination.

Whereupon the plaintiff gave evidence by its witness CHAS. CERAMI tending to prove that he was a dealer in fruits and vegetable- and had for ten years purchased and sold celery as a retail dealer
35 in the city of Washington. That he was shown a crate of celery of the New Arcade Co. in their storage in the presence of Mr. Levi Fritchman and that this celery was in a condition which is not unusual to find after being stored for some months. That such celery was worth on or about the 20th day of Oct. 1915 not over \$3 a crate. That he examined said celery very carefully and states that he has often seen celery from cold storage in much more unsalable condition and this was worth not less than \$3 the day of the examination.

Whereupon the plaintiff gave evidence tending to prove by its witness A. H. KAMMERER that he was a dealer in fruits and vegetables and had for 7 years purchased and sold celery as a retail dealer in the City of Washington. That he was shown a crate of celery of the New Arcade Co. in their storage in the presence of Mr. Levi Fritchman and that this celery was in a condition which is not unusual to find after being stored for some months. That such celery was worth on or about the 20th day of Oct. 1915 not over \$3 a crate. That he examined said celery very carefully and states that he has often seen celery from cold storage in much more unsalable condition and this was worth not less than \$2 the day of the examination.

Whereupon the plaintiff further gave evidence by the deposition of this witness HERBERT V. JOSEY that he was a resident of Maryland but had a position in Dallas, Texas to which place he was going to return in a week. In Oct. and Nov. 1915 he was chief engineer at

the Arcade. At that time he regulated the temperature of the cold storage. He read the temperature at intervals during the day, write it down on a log and turned the log into the office every day. He had knowledge of the storing of celery in Room C. "I had the temperature right when they first commenced to put the celery in the room. I think I had the temperature at 33° when they started to put the celery in, and they had the door opened the biggest part of the day, naturally the temperature ran up. "Had been employed three years at the Arcade. The effect on temperature of placing in cold storage of green celery is to run the temperature up. The celery was packed by the men who brought it there, the drivers on the wagons. According to the witness' judgment it was not properly packed. It was jammed up against the wall and right up almost to the ceiling without any air space at all. The condition of the celery itself was very rank and the roots were all muddy. They were muddy with black mud."

Cross-examination:

Examined several crates, don't know how many but could see it when the door was open. That left a heavy trail of mud all through the place.

The fact is he did not know the condition of the celery and did not examine all of it. It was very green, heavy stuff, big heavy celery and the roots were full of mud. It is grown in the ground and should have mud on the roots, but they wash it off before they sell it. The fact that it had mud on the roots of it would not indicate that it was rank, but it was rank. It was very big, heavy celery and very green. Celery may have mud on the roots and yet be perfectly good celery. Was there off and on while the celery was being packed. Did not see a lot of it when it was put in. Will not say it was not properly packed, "but it was not packed according to my judgment."

Q. Have you had any experience in packing celery? A. No, it is not in my business.

Q. You are not a celery expert? A. No, sir.

Q. Then it might have been packed perfectly right, so far as you know? A. So far as I know.

Q. And you admit you do not know when celery is properly packed, as an expert? A. As an expert; I admit that.

Did not call attention to the fact that the celery was not being packed according to his judgment. It was not his business to say anything about it. The proper temperature to keep celery is from 32 to 34 degrees after you get the temperature down.

Q. What do you mean by being rank? A. It was very green heavy stuff. Big heavy celery and the roots were full of mud.

37 Q. The fact that it had mud on the roots of it would not indicate that it was rank? A. No, but besides the mud on it it was rank. It was big heavy celery and very green.

Had other duties to perform was not there all the time it was being packed. "It was not packed according to his judgment." Was not a celery expert. Proper temperature from 32° to 34° after you get the temperature down. It takes several days after you put the celery in before you can get the temperature down to the proper place to

carry it, because you have the heat to take out of the celery. You can't do it at once. When they started packing the temperature was 33°.

Q. What was it when they finished packing? A. They ran it up to somewhere to 38° to 40° when they got the first batch in. Naturally they ran up the temperature.

Q. More than 32° would freeze it and higher than 34° would not properly preserve it, is that correct? A. Yes, it would vary when they put it in and take it out, can't hold the temperature, that is, all the time. Depends how much they have the door open. Every time they put in and took out some the temperature would go up. I kept celery there before and never had any spoil and I kept it there at about the same temperature.

Q. What effect has a temperature of as high as 36° on celery, if that injurious? A. No, I would not think it would be. After it had carried at 34° right along and would go up to 35 or 36°; I never had any trouble with it before and it would run up that much sometimes on me.

Q. How did the effect of proper air space effect the temperature? A. If you left an air space the cold air would circulate around and go thru it better while leaving an air space down thru the centre, or across the room, about midway. This would give a better circulation to the cold air.

38 In the winter of 1914 at the same place he kept a whole room full of celery. It was the room across the aisle. He believes the room was lettered "F". Did not have any other celery in storage at this time, unless it was across the aisle in the vegetable room. The dealers in the market had a little celery put in the vegetable room all the time. The celery of E. V. Owens was kept in room C. Room C was the only room full of celery during October and November 1915. To properly preserve celery the temperature should be kept at from 32 to 34 degrees lower than 32 would freeze it and higher than 34 would not properly preserve it.

Q. Celery is a vegetable which is easily spoiled, is it not, by not having proper temperature?

Mr. Giesy: I object to the question, on the ground that the witness has stated he was not a celery expert.

A. I do not know about that.

This room C did not have any water on the floor so far as he knows. Did not examine the celery after it was put in. They brought a big batch up one day and put it in and they had the door open the best part of the day and another time they brought some more up.

Whereupon the following prayer was submitted to the Court on behalf of the Plaintiff:

Plaintiff's Prayer No. 5.

If the jury believe from the evidence that the plaintiff was negligent in the conduct of its storage warehouse and the damage to the celery arose from no other cause than the negligence of the plaintiff then they could not find the damages of the defendant was over Five Hundred Dollars and should their verdict be for defendant it could only be for the difference between the defendant's damage not to exceed Five Hundred Dollars and the plaintiff's storage charges the defendant has admitted he owes—

and was denied.

To which ruling the plaintiff there and then excepted.

39 Four other prayers were submitted on behalf of the plaintiff and the Court refused to grant them saying that it would charge the jury in substance as requested to which ruling the plaintiff there and then excepted. The Court thereupon charged in substance as requested to which charge no exception was taken.

The four requests were as follows:

In the Supreme Court of the District of Columbia.

58771.

NEW ARCADE COMPANY, a Corporation under and by Virtue of the
Laws of Delaware, Plaintiff,

VS.

ERNEST V. OWEN, Defendant.

Plaintiff's Prayer No. 4.

That the jury are instructed that in considering the evidence they must bear in mind that in claiming a set off against the plaintiff's storage charges by way of damage the burden of proof is shifted to the defendant and the defendant must show affirmatively a negligent act or omission causing injury and that the damage to the celery arose from no other cause than the negligence of the plaintiff and if such negligence is not affirmatively proven the plaintiff is entitled to recover.

Leid vs. The Quaker City Cold Storage and Warehouse Co.
180 Pa. St. 330.

Plaintiff's Prayer No. 6.

If the jury believe from the evidence that the way the defendant placed his celery in plaintiff's cold storage warehouse and opened the cold storage for frequent withdrawals prevented plaintiff having

full control over its temperature and keeping it between 32° and 36° Fahr. as per its contract then the injury to defendant's celery, if any arose from another cause than the plaintiff's negligence or omission and your verdict should be for the plaintiff.

Leidy vs. The Quaker City Cold Storage and Warehouse Company 180 Pa. St. 330.

Code of Law D. C. Sec. 21 page 424.

Plaintiff's Prayer No. 7.

If the jury find from the evidence that they can not satisfactorily determine the question whether the loss and injury to the celery resulted from the acts or omissions of the plaintiff, they should find in favor of the plaintiff.

Leid v. The Quaker City Cold Storage and Warehouse Company 323 at p. 331.

Plaintiff's Prayer No. 8.

If the jury believe from the evidence that the plaintiff exercised such care as the contract contemplated, and the lack of such care was not the proximate cause of the alleged damage, then their verdict shall be for the plaintiff.

Smith vs. Diamond Ice and Storage Co. 118 Pac. p. 647.

S. HERBERT GIESY,
MAURICE D. ROSENBERG,
Attorneys for Plaintiff.

To Edwin C. Dutton, Attorney for the Defendant:

Please take notice that the above Bill of Exceptions will be presented to the Supreme Court of the District of Columbia in Criminal Court No. 2 before Mr. Justice McCoy for settlement on the 25th day of October 1917 at 10 o'clock A. M. or as soon thereafter as counsel can be heard.

S. HERBERT GIESY,
MAURICE D. ROSENBERG,
Attorneys for Plaintiff.

Service of copy of above Bill of Exceptions and notice of settlement acknowledged this 16th day of October 1917.

EDWIN C. DUTTON,
Attorney for Defendant.

And the plaintiff prays that the exceptions in this bill set forth may be saved to it, signed and sealed and made part of the record in this case, which is accordingly done this — day of March 1918 now for then.

This Bill of Exceptions agreed to.

_____,
Attorney for Defendant.
WALTER J. McCOY,
Justice.

March 6, 1918.

O. K.
E. C. D.

O. K.
S. H. G.

41 [Endorsed:] 58,771. New Arcade Co. vs. Owens. Bill of Exceptions. S. Herbert Giesy, attorney at law, Washington, D. C., National Union Building, 918 F Street.

Endorsed on cover: District of Columbia Supreme Court. No. 3178. New Arcade Co. &c., appellant, vs. Ernest V. Owens. Court of Appeals, District of Columbia. Filed Apr. 25, 1918. Henry W. Hodges, clerk.

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

SEP 9 - 1913

Henry W. Stodges
Delist

In the Court of Appeals
OF THE DISTRICT OF COLUMBIA.

OCTOBER TERM, 1918.

No. 3,178.

NEW ARCADE COMPANY, A CORPORATION
UNDER AND BY VIRTUE OF THE LAWS OF
DELAWARE, APPELLANT,

vs.

ERNEST V. OWENS, APPELLEE.

BRIEF FOR APPELLANT.

S. HERBERT GIESY,
M. D. ROSENBERG,
Attorneys for Appellant.

In the Court of Appeals OF THE DISTRICT OF COLUMBIA.

OCTOBER TERM, 1918.

No. 3,178.

NEW ARCADE COMPANY, A CORPORATION
UNDER AND BY VIRTUE OF THE LAWS OF
DELAWARE, APPELLANT,

vs.

ERNEST V. OWENS, APPELLEE.

BRIEF FOR APPELLANT.

Statement of Facts.

The defendant, Ernest V. Owens, through his employees, Bowen and Davis (R., 12), called on the appellant, the New Arcade Company, to secure cold storage for a certain lot of celery which he could not get into the Terminal Storage Company's cold storage, and at first engaged a room in appellant's cold storage warehouse at the rate of \$100.00 a month (R., 14). Afterwards, about the 22d day of October, 1915, he telephoned that he would not rent the room but would store the celery in general storage and the appellant accepted it at the rate of 25c a crate per

month for the first month and 20c a month for each succeeding month, and wrote the letter dated October 22 in confirmation of the agreement entered into which was mailed by George C. Rogers, the secretary of the appellant company, to defendant Owens in an envelope properly addressed and bearing thereon a direction to return if not delivered, this letter was mailed by said Rogers after the proper amount of postage was attached (R., 29). This letter stated, among other things, that (R., 15) :

“As we left the stacking and arrangement to your men, with the understanding that you were taking the room, we of course, will not be responsible for any damgae done to that placed in the storage by you.”

The defendant was warned by both Smoot, the storage superintendent, and Sanders, the president of appellant corporation, the New Arcade Company, that the temperature could not be kept down if the celery was delivered more than a wagon load at a time (R., 26 and 30), but notwithstanding the warning, 350 crates were delivered the first day and “worked very late that night” to get it in the room, the temperature by defendant’s disregard of this warning being run up from 33 degrees (R. 32) to 40 degrees (R., 25). It was steadily reduced as the heat was extracted (R., 33) until the 18th of November, 1915. On November 8, to accommodate defendant, 50 crates were withdrawn (R., 28) and the temperature naturally ran up. Thereafter there was a constant daily withdrawal by the defendant, necessitating the daily opening of the door and consequent increase of the temperature (R., 27 and 28). This was at the request of defendant, and for his accommodation and contrary to the warning that the opening of the door and keeping it open ran the temperature up. No complaint was made by defendant Owens, or either of his

employees, about temperature (R., 30) until he was asked to pay the storage charges and no allegation was made that the withdrawals were made because of any neglect on the part of the appellant or no notification that they were made for any other reason than that defendant had a market for the celery. The sales slips introduced in evidence (R., 15, 16 and 17) account for only 305 crates, whereas 462 crates were placed in storage and all but one withdrawn, but defendant's witness Bowen admits (R., 16) that there was nothing about these slips to identify them as referring to the celery coming from the Arcade.

The three sheets produced by defendant's witness Davis purporting to show what the 462 crates actually sold for and what they should have sold for were not made at the time of the transaction, but were made after the transaction (R., 18). The defendant testified the original tickets were lost (R., 13) and Davis, the bookkeeper, testifies "there is no record made when we get cash for it." Without making any complaint to appellant about the condition of the cold storage according to the witness Davis at the time this celery was being withdrawn, which began on November 4, 1915 (R., 28), he suggested to defendant Owens that a record be kept of what good celery was selling for. Mr. Owens testified he "*went down the line and asked different people what they got for good celery*" (R., 13), but he does not say he made any memoranda as to what replies they made, but generalizes that the replies were from \$3.50 to \$4.00. Davis, defendant's bookkeeper, testified that he kept little notations, but he does not testify from what source this information was obtained, and does not even say that the information gathered by defendant Owens by going down the line was furnished to him. This self-serving testimony, not corroborated by any disinterested witness, made the basis of a claim in set-off, is in contrast with the testimony of appellant's witnesses Tassa,

Cerami and Kammerer, who (R., 29) testified that close to Christmas or New Year's they were shown a crate of the celery by the witness Smoot, in the presence of Levi Fritchman. The witness Tassa testified (R., 31) that such celery was on or about the 20th of October, 1915, worth not over \$2.50 a crate, and that he had seen celery in cold storage in much more unsalable condition than on the day of the examination of the single crate, which was then worth not less than \$1.75 a crate. The appellant's witness Cerami (R., 31) testified that on the 20th of October it was worth \$3.00 a crate and that on the day of examination it was still worth \$3.00 a crate. The appellant's witness Kammerer (R., 31) testified that on the 20th of October the celery was worth \$3.00 a crate and on the day of examination was worth not less than \$2.00 a crate.

Defendant Owens testified (R., 12) that after withdrawing the celery from the storage room he had to sell it "around \$1.50 to \$1.25 a crate," and accordingly it would appear that the test of value should be deduced from the testimony of the three disinterested witnesses, Tassa, Cerami and Kammerer, rather than from the defendant himself (Owens), and if sold at the prices testified by Owens it would appear that this was done rather from choice than from necessity.

The single crate exhibited to these witnesses had been left by defendant Owens after final withdrawal of his celery on the 29th of November, 1915, and was seen by the witnesses about Christmas or New Year's, so that it was in cold storage one month longer than any of the rest of the celery.

This action was originally instituted in the Municipal Court (R., 3) for recovery of storage charges amounting to \$181.50, whereupon the case was removed by writ of *certiorari* to the Supreme Court of the District of Columbia, in which court the defendant admitted his liability

under his plea of set-off for the said storage charges, claiming, however, in the said plea the sum of \$1,045.90 (R., 8), damages arising from tort (R., 7), and which amount was awarded to defendant less the storage charges in full and which was in excess of the amount allowable under the jurisdiction of the Municipal Court where the case was first instituted.

Assignment of Errors.

1. The admission in evidence of the paper writing purporting to be a record of the sales of the celery for the damage of which a recovery is sought in this case together with statement purporting to show the market price obtained for good celery on the day of the sales referred to, and which statement and record was not made at the time of the transaction.
2. The admission of hearsay evidence to prove the market value of celery at the time and times of sales as testified to in this case.
3. The admission in evidence of engineer's daily log being a part only of the deposition of Herbert V. Josey, a witness for the plaintiff, as part of the defendant's case in chief, as the introduction of the said daily log and the absence of the deponent, deprived plaintiff's counsel of the opportunity for cross-examination.
4. Refusing plaintiff's prayer numbered five and ruling that a case instituted in the Municipal Court and removed to the Supreme Court of the District of Columbia by *certiorari* is not limited as to the amount of recovery by the jurisdiction of the Municipal Court.
5. The refusal by the court of all of plaintiff's prayers and charging the jury in general language and not in the specific instructions sought by the prayers.

ARGUMENT.**I.**

The three sheets of paper containing the alleged actual sales and the market value of good celery on the day of the sales were admitted in evidence over the objection of appellant (R., 13, 18), said objection being urged for the following reasons:

First, because they were not original entries made at the time of the transaction, but in the words of their author "I made little notations and after all were sold I copied it myself on these three sheets" (R., 18). The sales slips produced only account for 305 crates of celery. The defendant Owens testifies the "three sheets contained the record of the sales and were made from the tickets" (R., 13), but in this he is not corroborated by his own witness Davis (R., 18), who Owens testifies made the sheets and not he himself and Davis himself says he made the sheets from "little notations" made by him and does not claim to have made them from the slips, and further says "when we make cash sales there are no tickets." The defendant's own witness Bowen admits that the slips which were produced and some of which he identifies as being in his handwriting, do not identify the celery as being that brought from the Arcade (R., 16).

Secondly, because the admission in evidence of the three sheets was that they were offered as evidence of what the market value of good celery was on the day of sale. This court has laid down the rule for establishing market value:

"The market price of articles of commerce at a time in the past, which it has been held may be proved by the private entries of disinterested persons dealing therein at the time."

National Union vs. Thomas, 10 App. D. C., 292.

But the defendant Owens with the burden of proof on him to establish his claim of damages pleaded in set-off to the admitted debt to appellant, produces no disinterested witnesses or the private entries of any disinterested person dealing in celery at the time. He attempts to establish market value by repeating what he heard from people *on the line*, who had never seen the celery sold by Owens or had any idea of its kind or quality; that good celery brought from November 4, 1915, the date of the first sale, to December 3, the date of the last sale, from \$3.50 to \$4.00 a crate (R., 13). He made no memorandum of the gossip he heard *on the line*, and does not testify he ever told Davis what he had heard for his guidance in making up the three sheets (R., 13). Davis does not claim to have been guided in making up the three sheets by any information gained by Owens in going down the line. He testifies:

"I found out the price of good celery; made notes on slips and copied it on the typewriter" (R., 18).

There is not a memorandum of an entry of a single transaction made by a disinterested person dealing in celery at the time. The figures of market value are hearsay, unconnected with any actual transaction of celery of like kind and quality with defendant's celery, and the three sheets amount to a self-serving declaration.

Market value is not a correct measure of damages. If it is it could be only as to the wholesale price which the defendant Owens would have been required to pay in securing celery to sell at the retail price of \$3.50 to \$4.00. If *on the line* they were selling for \$3.50 to \$4.00, provided it was shown that it was the same kind and quality of celery Owens had taken to the Arcade, the line dealers had purchased it for less than they were selling it for and the cost of replacement, not the original cost plus the prospective profits, was the measure of damages.

II.

"It follows, therefore, that the loss of profits here cannot reasonably be considered such a consequence of the breach of contract as could have been fairly and reasonably contemplated by both parties when they made this contract. For such loss would neither have flowed naturally from the breach of this contract in the great multitude of such cases occurring under ordinary circumstances, nor even the special circumstances, which, perhaps, would have made it a reasonable and natural consequence of such breach of contract, communicated to or known by defendants."

Hadley et al. vs. Baxendale et al., 9 Exchequer Reports, 356; 156 English Reports, Reprint, 145.

"Without undertaking to determine the distinct terms that apply in the measure of damages in actions of contract on the one hand, and the tort on the other (for it is not called for in this case). We may say that the line of demarkation, plain enough in some instances, is not always of easy ascertainment. When the tort consists merely of negligence in the performance of a duty, the rule ordinarily is, that in order to warrant a finding that negligence or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligent or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances."

Fererro vs. Telegraph Co., 9 App. D. C., 475.

But had the market value been attempted to be shown for the purpose of proving the cost of replacement and not profit it could not be proven by the self-serving declaration of the appellee as to what somebody else had told him, unconnected with any actual sales and not even put in writing by the party hearing the verbal statements. The de-

fendant Owens does not testify he told Davis what he heard *on the line* about market value, and Davis testified that the three sheets were made up from information he secured and that "I found out the price of good celery" (R., 18).

"Independent of the charge, the court was also in error, I think, in admitting the Shipping and Price Current List as evidence of the value of the wool, without some proof showing how or in what manner it was made up; where the information it contained was obtained, or whether the quotations of prices made were derived from actual sales or otherwise. It is not plain how a newspaper, containing the price current of merchandise, of itself, and aside from any explanation as to the authority from which it was obtained, can be made legitimate evidence of the facts stated."

Whelan vs. Lynch, 60 N. Y. Reports, 474.

"In short we have very infrequent transactions, of unknown significance which fall short of furnishing a satisfactory indication of the value of the large block of stock held by the State."

Virginia vs. West Virginia, 238 U. S., 213.

"But if they are such as would have been realized by the party from other independent and collateral undertakings, although entered into in consequence and on the faith of the principal contract, then they are too uncertain and remote to be taken into consideration as a part of the damages occasioned by the breach of the contract in suit."

Western Union Telegraph Co. vs. Hall, 124 U. S., 455.

If under the rule for the measure of damages laid down by the United States Supreme Court the market value was competent evidence, the way to have secured it, in order

to comply with the rule, would have been from the private entries of disinterested persons dealing in celery at the time and not in the manner herein testified to.

“Market reports incompetent without some evidence authenticating reports.”

National Bank of Commerce vs. New Bedford,
175 Mass., 261; Chaffee & Co. vs. U. S., 18
Wall., 542.

A witness proved the value of wheat in Albany in 1822, 1823, 1824 and 1825, derived by him from the books of large dealers in wheat at that place, he knowing nothing of the price of his own knowledge, and the court said:

“The proof was by a witness who had inquired of merchants dealing in the article and *examined their books.*”

Lush vs. Druse, 4 Wend., 313.
Alfonso vs. U. S., 2 Story, 426.
Griffen vs. Colver, 16 N. Y., 492.

III.

It is a well established principle that when a witness for either the plaintiff or defendant is called by the other side the party calling him makes him his own witness. The deposition of Herbert V. Josey was taken on behalf of plaintiff and was for the purpose of showing the manner in which defendant Owens had placed the celery in the cold storage and the consequent increase of the temperature by reason of the method of delivery by said defendant Owens. The logs were but an incident of the testimony of Josey. By permitting the logs to be put in as part of defendant's case on his claim of set-off, the witness being absent the appellant was prevented from having the benefit of cross-examination in explanation of the logs.

"Although the court may exercise a reasonable discretion in regulating or limiting the cross-examination, yet it is clearly error to exclude cross-examination upon subjects included in the examination in chief, where such ruling is prejudicial."

Jones Commentaries on Evidence, paragraph 821.
Eames vs. Kaiser, 142 U. S., 492.

"But we have been unable to find, nor have we been referred to any case in which the court has passed on the question whether the party has the right to use a part of the deposition taken by his adversary, without introducing it as a whole * * * but the better rule seems to be that a part of a deposition cannot be read and part omitted, but the entire deposition competent and pertinent to the issues involved should be read."

Jones vs. S. C. & C. Street Ry. Co., 162 Ky., 177.

"An offer of a deposition in evidence by the party taking it is presumed to be an offer of it in its entirety, because he cannot be allowed to put in a part only and withhold a part relating to the same subject matter."

Lee vs. Coon Rapids Bank, 166 Iowa, 252.

If the party taking the deposition cannot put in part, certainly his adversary cannot be permitted to use only a part and supply with that part unexplained, deficiency in his own proof.

Had these logs not been introduced a motion to take from the jury could with propriety have been made as the defendant's case on the set-off had failed to meet the requirements of the burden of proof and was based on hearsay and self-serving declarations.

"That when the evidence given at the trial, with all inferences that a jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff,

so that such verdict, if rendered, must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant."

Randall vs. B. & O. R. R. Co., 109 U. S., 478.

IV.

The fifth prayer offered by plaintiff and denied by the court was based on the fact that this cause originated in the Municipal Court by an action in debt brought by appellant against the defendant Ernest V. Owens, claiming \$181.50 for storage charges. The defendant Owens removed the cause by writ of *certiorari* to the Supreme Court of the District of Columbia, and in the latter court pleaded a set-off in the amount of \$1,045.90.

This is asking removal not on the ground of concurrent jurisdiction as alleged in paragraph four of the petition (R., 3), but on the ground that a damage suit defendant desires to bring is not within the jurisdiction of the Municipal Court and that it should be prevented from trying a case within its jurisdiction in order to give defendant Owens a chance to recover a judgment for damages in excess of the Municipal Court's jurisdiction with which to pay the debt admitted to be due.

Section 8 of the Code of the District of Columbia provides that in all cases of *concurrent* jurisdiction, the defendant may remove the case for trial into the Supreme Court of the District by writ of *certiorari* * * * and as the said fifth paragraph of defendant's petition alleges that his claim in set-off is in excess of \$500.00, manifestly the writ should have been disallowed, as the court was without jurisdiction to remove the case by *certiorari*.

The act of February 17, 1909, creating the Municipal Court, provides, among other things, that the jurisdiction of the same shall be exclusive when the amount claimed for debt or damages or damage to personal property claimed

does not exceed \$100.00 and not in excess of \$500.000, with the same right to remove any case by *certiorari* as heretofore in cases of concurrent jurisdiction.

In *Wallace vs. Degree*, 38 App. D. C., 145, it was attempted in a case appealed from the Municipal Court to the Supreme Court of the District of Columbia to sustain a judgment of \$800.00, in which the court, among other things, said:

"The authorities all agree that when the court of first instance has no jurisdiction the appellate court can acquire none by virtue of the appeal, notwithstanding the trial therein being *de novo*, and it would have original jurisdiction of the amount involved."

It might be urged that the case of *Wallace vs. Degree* was based upon an appeal from the Municipal Court and not *certiorari*, but plaintiff contends that in principal both are cases originating in the Municipal Court, and the limitations as to the jurisdiction of the Municipal Court should prevail as much in *certiorari* as in the case taken to the Supreme Court of the District of Columbia on appeal.

"Where cases are *certioraried* up for trial *de novo*, the jurisdiction of the higher court depends' upon that of the justice."

24 Cyc., 763.

"If the justice had no jurisdiction in the cause owing to failure to file sufficient complaint, the Circuit Court can acquire none by removal."

McQuoid vs. Lamb, 19 Mo. App., 153.

Dixon vs. Caruthers, 9 Yerger (Tenn.), 30.

"When the Circuit Court is ordinarily speaking a court of general jurisdiction, still on *certiorari* and appeal from the justice court its jurisdiction is in the main in accordance with the jurisdiction of the lower court."

Timmons vs. Mathis, 72 S. E. Reporter, 279 (Ga.).

"Consent cannot confer jurisdiction in case of *certiorari* when the law precludes."

Winn vs. Freele, 19 Ala., 171.

"Where the question of jurisdiction was not raised in the court below, and such want of jurisdiction appears on the record, the trial court is bound to take notice of the want of jurisdiction."

Mansfield vs. Winter, 10 D. C. App., 549.

It will be observed under Section 1565 of the Code of Law for the District of Columbia that a defendant who files a plea of set-off "shall be deemed to have brought an action at the time of filing such plea against the plaintiff * * * but it shall not be necessary that the amount of the claim to be so set off shall be such that the court would have jurisdiction of an original action to recover the same."

It is manifest that this restriction last named is applicable to cases originally instituted in the Supreme Court of the District of Columbia and not to those originating in the Municipal Court of the District of Columbia, as is apparent from the last provision of said Section 1565, which is as follows: "Provided, that nothing herein contained shall be construed to enlarge the jurisdiction of the justices of the peace so as to authorize any judgment by any such justice in excess of \$300.00." (Since increased to \$500.00.)

V.

Plaintiff's prayers numbered 4, 6, 7 and 8 (R., 34 and 35), presented to the trial judge, and were not granted, notwithstanding the fact that they were sound in law and applicable to the testimony in the case; and, therefore, it is contended by appellant that it was error for the court so to exclude them and to instruct the jury in generalities upon the points raised in the said prayers.

District of Columbia vs. Gray, 1 D. C. App., 506.

Plaintiff's prayer No. 4 was as follows:

"That the jury are instructed that in considering the evidence they must bear in mind that in claiming a set off against the plaintiff's storage charges by way of damage the burden of proof is shifted to the defendant and the defendant must show affirmatively a negligent act or omission causing injury and that the damage to the celery arose from no other cause than the negligence of the plaintiff, and if such negligence is not affirmatively proven the plaintiff is entitled to recover."

"Burden of proof is upon the party alleging the negligence."

Grieve vs. N. Y. Central R. R. Co., 25 N. Y. App. Div., 518.

"Negligence on the part of the defendant could not be assumed from the mere fact that goods of the plaintiff were injured and that negligent acts or omissions causing injury must be affirmatively proved. The court also charged in answer to the defendant's sixth point that if the injury to the plaintiff's squabs and chickens arose from any other cause than negligence of the defendant no matter what the cause might be the defendant was not responsible."

Leidy vs. The Quaker City Cold Storage and Warehouse Co., 180 Pa. St., 330; Barren *et al.* vs. Eldridge *et al.*, 100 Mass., 459.

The defendant Owens admits receiving the letter of October 20, 1915, in which appellant proposed to keep the cold storage at between 32 degrees and 36 degrees Fahr. (R., 14), but made no assertion that at that time he stated the temperature should be kept at 31 degrees. He was warned by both Smoot, the superintendent of the cold

storage, and Sanders, the president of the appellant company, that the celery must not be brought to the storage too fast, as the temperature could not be kept down.

Smoot testified:

"I talked with Mr. Owens' office when I found they were sending as fast as they were and the door had to be kept open continually. I knew that the temperature would be running up. I told them that the door had to be kept open continually; that the temperature would be running up; that they were entirely too fast and much faster than arrangements with Mr. Davis had been made for, and they must do something to prevent the celery coming so fast" (R., 26).

Sanders testified that he—

"advised Mr. Owens not to send the celery by telephoning him not to send it more than one wagon at a time, advised him so in his own interest, as he was taking the responsibility, called him up when the first lot of celery came. He told me over the phone to advise his drivers to store a certain part of the celery near the front. I got the message myself over the phone and transmitted it to Mr. Smoot. He stated it was overripe and should be stored in the corner near the front where it could be easily taken out" (R., 29).

The appellant company followed up these warnings with the letter of October 22, 1915, which stated: "As we left the stacking and arrangement to your men, with the understanding that you were taking the room; we, of course, will not be responsible for any damage to that placed in storage by you."

Atherton vs. Atherton, 181 U. S., 171.

Mr. Owens himself testifies: "There was some arrangement made about taking a room, but later on I decided not to take the room, but to pay monthly by the crate" (R., 12). So that he himself discharged the appellant company from even abiding by their proposition to keep the temperature at "between 32 degrees and 36 degrees Fahr.," and in face of the warning and the letter of October 22, 1915, made no demand that the temperature be reduced to 31 degrees. In face of such a situation is prayer number four not "sound in law and applicable to the testimony in the case," and if so, was it not error "not to instruct the jury in some sufficient form specifically?"

District of Columbia vs. Gray, 1 App. D. C., 506.

Plaintiff's prayer No. 6 was as follows:

"If the jury believe from the evidence that the way the defendant placed his celery in plaintiff's cold storage warehouse and opened the cold storage for frequent withdrawals prevented plaintiff having full control over its temperature and keeping it between 32 and 36 degrees Fahr., as per contract, then the injury to defendant's celery, if any arose from another cause than the plaintiff's negligence or omission, and your verdict should be for the plaintiff."

"Damages must not be the remote, but proximate consequence."

Gordon vs. Butts, 2 N. J. Law, 334.

The evidence shows that the defendant delivered and packed the celery in a manner to prevent the temperature from being kept down, and on November 4 (R., 28) began opening the door for daily withdrawals of the celery, each

time increasing the temperature of the celery left behind.

Section 21 of the Code of Law for the District of Columbia, page 424, reads as follows:

“Liability for Care of Goods—A warehouseman shall be liable for any loss or injury to the goods caused by his failure to exercise such care in regard to them as a reasonably careful owner of similar goods would exercise, but he shall not be liable, in the absence of an agreement to the contrary, for any loss or injury to the goods which could not have been avoided by the exercise of such care.”

Defendant Owens gave evidence at the trial that the proper temperature for celery was 31 degrees, but when appellant by his letter of October 20, 1915, proposed to keep the room to be rented at “between 32 degrees and 36 degrees Fahr.,” he said nothing about requiring it to be kept at 31 degrees.

“If such a duty rested upon the plaintiff it was imposed either by law or by the agreement of the parties. No claim is or can be made in the case as it stands, that such a duty was imposed upon them by contract.”

Allen et al. vs. Somers, 73 Conn., 358.

“In such cases the damages sustained are disallowed not because they are uncertain, nor because they are merely consequential or remote, but because they cannot be considered as having been within the contemplation of the parties at the time of entering into the contract.”

Griffen vs. Colver, 16 N. Y., 493.

Plaintiff's prayer No. 7 was as follows:

“If the jury find from the evidence that they cannot satisfactorily determine the question whether the

loss and injury to the celery resulted from the acts or omissions of the plaintiff, they should find in favor of the plaintiff."

"It is a well established rule that the damages to be recovered for a breach of contract must be shown with certainty and not left to speculation or conjecture. In the practical application of this general rule others have been adopted as guides in ascertaining the required certainty; as (1) that the damage must flow naturally and directly from the breach of the contract, that it must be such as might be presumed to follow its violation, and (2) must be not the remote, but proximate consequence of such breach."

Rhodes vs. Baird, 16 Ohio St., 581.

Plaintiff's prayer No. 8 was as follows:

"If the jury believe from the evidence that the plaintiff exercised such care as the contract contemplated, and the lack of such care was not the proximate cause of the alleged damage, then their verdict shall be for the plaintiff."

The plaintiff's witness Josey testified that:

"I had the temperature right when they first commenced to put the celery in the room; I think I had the temperature at 33 degrees when they started to put the celery in, and that I had the door open the biggest part of the day, naturally the temperature ran up * * * the celery was packed by the men who brought it there, the drivers on the wagon (R., 32). It takes several days after putting the celery in before you get the temperature down to the proper place to carry it, then I had to take the heat out of the celery" (R., 33).

"Plaintiff is liable only in consequence of neglect to use that care that prudent men could ordinarily use over their own property."

Knapp vs. Curtiss & Root, 9 Wend., 61.

"The general rule is that a bailee of goods to be kept for hire must in keeping them exercise that degree of care and diligence which may reasonably be expected from a person of ordinary prudence in his situation."

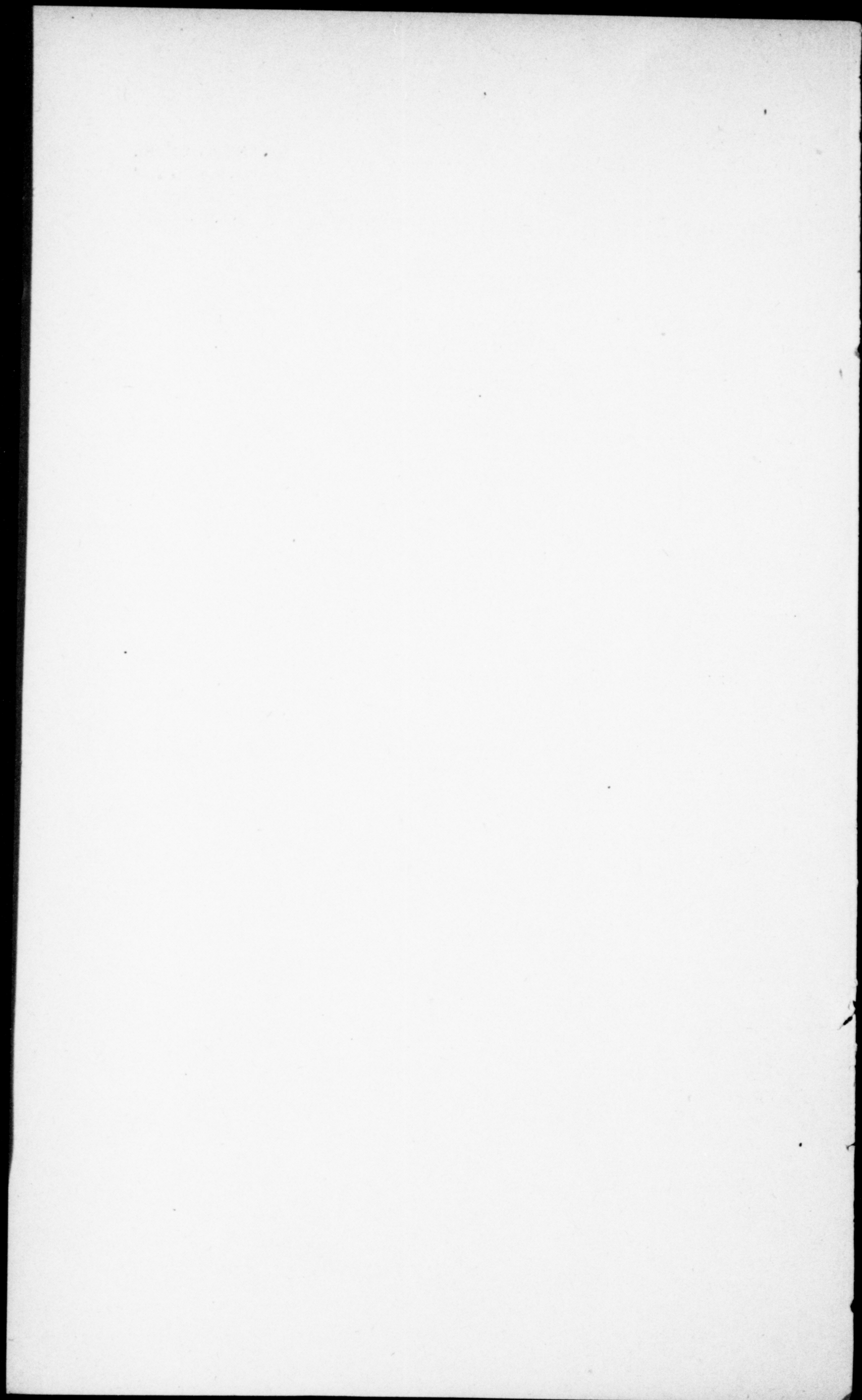
Allen *et al.* vs. Somers, 73 Conn., 358.

"Proper care is always a question of fact and its determination is to be controlled by the surrounding circumstances."

Sutherland *et al.* vs. Albany Cold Storage, 55 N. Y. App. Div., 215.

It is respectfully submitted that, because of the errors shown, the judgment should be reversed and the case remanded to the Supreme Court with directions to enter up judgment for plaintiff for \$181.50, with interest and costs.

S. HERBERT GIESY,
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Attorneys for Appellant.



COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

OCT 1 - 1918

Henry W. Hodges
Deputy Clerk

In the Court of Appeals of the District of Columbia.

OCTOBER TERM, 1918.

No. 3,178.

NEW ARCADE COMPANY, A CORPORATION,
APPELLANT,

vs.

ERNEST V. OWENS, APPELLEE.

BRIEF FOR APPELLEE.

EDWIN C. DUTTON,
TRACY L. JEFFORDS,
Attorneys for Appellee.

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Statement of Case.

In October, 1915, the defendant below, who is the appellee here, being a produce merchant selling, among other things, celery, had at the railroad freight station several carloads of celery, a part of which had been stored with the Terminal Storage Company, and appellee, having no place for the rest, application was made to the plaintiff below, who is the appellant here, for storage at the Arcade Market, appellant operating a cold storage plant. An agreement was finally made by which appellee was to pay a certain price per crate for the storage of all

the celery he desired to store. On October 20, 1915, 350 crates were sent to the storage house and actually stored by appellant's and appellee's men, and the rest of the celery was sent to the storage house on October 25th and 26th, being a total of 462 crates.

In November and December, 1915, when the celery was taken out of cold storage, it was found to be damaged and had to be sold at a price considerably less than it would have brought had it been in first-class condition. Appellee sold the celery for the best price obtainable, and when he was sued for the storage charges in the Municipal Court he, by writ of certiorari, took the case to the Supreme Court of the District, where a declaration was filed by appellant, and appellee filed a plea of set-off for damages growing out of the failure on the part of the storage company to keep the proper temperature for the preservation of the celery. At the trial a verdict was rendered for the appellee for the full amount of damages claimed, less the full amount of storage bill, and upon a motion for a new trial being argued and submitted to the court, the same was overruled and a judgment on the verdict entered, and from that judgment this appeal was taken.

Assignment of Errors.

In taking up the assignment of errors, we desire to call the court's attention to the fact that the Bill of Exceptions in this case does not purport to contain all the evidence or the substance of all the evidence or all the proceedings in this case. As was said by the Supreme Court :

"In this case there is nothing whatever in the Bill of Exceptions to show that the evidence con-

tained therein is all the evidence that was given on the trial, and we can not presume, for the purpose of reversing the judgment, that there was no evidence given upon which the jury might rightfully have found the verdict which they did."

U. S. vs. Copper Queen Mining Co., 185 U. S., 495, p. 498.

Slye vs. Guerdrum, 29 App. D. C., 550.

The first assignment of error is that a record of the sales of the stored celery with market prices for same was not made at the time of the sales.

For this exception there is no support in the record.

Appellee testified:

"The following sale tickets were made by witness at the time sales were made by him and are in his handwriting" (Rec., 15).

and they were admitted in evidence.

Bowen, a witness for appellee, testified he had been in the market business a number of years and made sales of celery indicated by certain tickets, and they were in his handwriting (Rec., 16), and they were admitted in evidence.

Davis, a witness for appellee, who had been in the fruit and produce business twenty-five years, testified that sales of celery indicated by certain tickets were in his handwriting and they were admitted in evidence (Rec., 16, 17, 18).

We are unable to see how more positive and direct proof could be had to these sale slips than the testimony of the men who made them and the same being in their own handwriting.

The second assignment of error relates to hearsay as to the market price of celery when these sales were made.

Appellee and several of his witnesses testified that they were in the celery and grocery and produce business and had been for years and knew the market price of good celery and of damaged celery on the days said damaged celery was sold and that the sale tickets and sale sheets admitted in evidence correctly stated the right, fair and average price of good celery and the sale prices of the damaged celery on the days said celery was sold.

On this point appellee testified:

"Had been in the market business many years and knew the quality and price of celery at this time" (Rec., 15); also

"Q. How did you determine the market price?

"A. I was posted, watching market quotations and noticing what different people said" (Rec., 13).

It further appeared that one of the witnesses for appellee took said original sale slips and copied same with a typewriter and thereupon the typewritten copy was admitted in evidence, and its admissibility is justified by the testimony as to said sale slips and copying.

"Q. Can you tell what record this is?

"A. This is the record of celery that came out of the Arcade storage.

"Q. What did you make it from?

"A. From sales slips."

By the court:

"Do you know Mr. Davis that the prices were correct at the time the paper was made?

"A. Yes." (Rec., 18.)

The testimony was admissible.

Cliquot's Champagne Case, 3 Wall., 114, at page 141.

The sale slips (Rec., 15, 16, 17) account for but 305 crates, whereas the typewritten sheets (Rec. 19, 20, 21, 22, 23) and the Bill of Particulars of appellee (Rec., 8), which is the same as the typewritten sheets, account for 462 crates of celery. It will be noted that appellee testified (Rec., 13) that these records, meaning thereby these typewritten sheets, were taken from the original tickets and the tickets were made at the time of the sale and some of the tickets were lost after the typewritten copy had been made. When the celery was sold for cash no sale slips were made, but a notation was made by the seller and from these notations and from the sale slips that were made the witness Davis made up the typewritten sheets that were put in evidence (Rec., 18).

The third assignment of error is in effect that appellee had no right to use a part of a deposition taken by appellant sometime before the trial. The objection is made upon the ground that appellant's counsel had not an opportunity for cross-examination of his own witness, who was the engineer. The log in the deposition showed the temperature for each day while this celery was in storage.

It is difficult to understand how any cross-examination of witness could have effected this record of the temperature.

When in the taking of a deposition of a witness the adverse party has appeared and cross-examined, he is entitled to the benefit of the deposition and may read such

portions of it as he chooses without being compelled to read the whole. Appellee did cross-examine (Rec., 32).

Converse vs. Meyer, 14 Neb., 190.

Gellatly vs. Lowery, 6 Bosw. (N. Y.), 113.

VanHorn vs. Smith, 59 Iowa, 142.

The fact remains, however, so far as this record shows anything, that this same deposition of Herbert V. Josey was offered in evidence in its entirety by appellant (Rec., 31, 32, 33).

In appellant's brief (p. 11) there seems to be some sort of contention that had the logs not been introduced that a motion to take the case from the jury might have been made, but the record in this case does not purport to give all the evidence or all the proceedings; therefore, this court could not say whether or not such a motion was made, or if not, why not?

Appellant's fourth assignment of error raises the sole question whether or not the trial court had jurisdiction to enter a judgment for more than Five Hundred Dollars.

Appellee stated in his petition for writ of certiorari that his set-off was more than \$500 (Rec., 2).

Appellant filed its declaration after that and all its other pleadings and proceeded with the trial and did not raise this objection until the testimony was closed and the case ready for the jury.

Sec. 1565 of the Code of Laws for the District of Columbia says that a defendant who files a plea of set-off

"shall be deemed to have brought an action at the time of filing such plea,"

and therefore the appellee did not begin his suit for dam-

ages for more than \$500 until the case was in the Supreme Court of the District of Columbia on certiorari from the Municipal Court.

This court has passed on this question and says as follows:

“Upon the return of the justice, the cause acquired a standing in the Supreme Court of the District as if it had been originally instituted therein.

“When the case was brought into the Supreme Court by certiorari, it was then, and from thence became, a case pending in the Supreme Court, as fully and to all intents and purposes as if it had been originally instituted in that court.”

And in the same opinion this court says:

“The case having been thus rightfully removed into the Supreme Court, the action was thenceforth pending therein.”

Bradford vs. Brown, 22 App. D. C., 455.

But if it be contended that the jurisdiction in set-off is to be determined by the \$500 limit of the Municipal Court, a part of same section of the Code is as follows:

“It shall not be necessary that the amount of the claim so sought to be set off shall be such that the court would have jurisdiction of an original action to recover same.”

This is express statutory authority for filing in the Municipal Court a set-off for more than \$500.

The question before the court is not as to a judgment rendered in the Municipal Court, or set-off filed there, as it was filed in the Supreme Court.

Appellant's fifth assignment of error is that the court denied four prayers. The court charged the jury in substance as requested in these four prayers and no exception was taken (Rec., 34). If it be assumed that these prayers were correct there was no error in denying them.

On this point this court, in a similar case, said as follows:

"In our opinion, this charge, no part of which was excepted to, clearly and fairly stated the law applicable. * * * As it embodied all that was contained in the refused instruction the denial of the latter was not error."

Pickford vs. Talbott, 28 App. D. C., 498.

Presbrey vs. Thomas, 1 App. D. C., 171.

Gleeson vs. Va. Mid. R. R. Co., 1 App. D. C., 185.

Met. R. R. Co. vs. Snashall, 3 App. D. C., 420.

Dist. of Col. vs. Wilcox, 4 App. D. C., 90.

The bill of exceptions does not state the judge's charge to the jury, but does state that his charge was in substance as requested in the four prayers, and that appellant took no exceptions to it (Rec., 34).

It is respectfully submitted that this court should affirm the judgment of the trial court.

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Attorneys for Appellee.

September, 1918.

